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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 870

THE BOEING COMPANY, FORMERLY BOEING AIRPLANE COMPANY, PETITIONER

v.

THE RENEGOTIATION BOARD OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. B, 69–71) is reported at 325 F. 2d 885. The opinion of the Tax Court (Pet. App. A, 11–68) is reported at 37 T.C. 613.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1963. The petition for a writ of certiorari was filed on February 27, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under the Renegotiation Act of 1951, in cases filed prior to July 3, 1962, the courts of appeals have jurisdiction to review Tax Court determinations of excessive profits which do not involve constitutional and jurisdictional issues.

STATUTE INVOLVED

Section 108 of the Renegotiation Act of 1951, as amended prior to the enactment of Pub. L. 87-520 (July 3, 1962, 76 Stat. 134), provided in pertinent part (50 U.S.C. App. 1218):

> Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may—
>
> * * * * *
>
> file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. * * *

STATEMENT

1. *The underlying facts.* The basic facts, most of which were stipulated or found by the Tax Court, are not in dispute. Petitioner, a large defense contractor with its principal place of business in Seattle, Washington, was at all times material to this case engaged in the design and manufacture of airframes, primarily for the military services (Pet. App. 21–22).[1] During 1952, its receipts and accruals on contracts and subcontracts subject to renegotiation were $737.5 million, and constituted more than 99% of its total business (*Ibid;* Stip. #1, ¶ 13, Ex. 18R). Petitioner's renegotiable business was performed mostly in government-owned plants and with government-owned machinery and equipment for which petitioner paid no rent, and the government furnished most of the necessary working capital (Pet. App. 33, 39–40). Petitioner incurred no significant risk in the performance of its renegotiable contracts (Pet. App. 56).

Petitioner's 1952 profits on renegotiable contracts were $56.7 million before renegotiation and taxes (Pet. App. 21)—a return of 98% on its beginning book net worth and 98% on its invested capital (Pet. App. 42–43; Stip. #1, ¶ 13, Ex. 18R). The average ratio of profit to book net worth for all American manufacturers before taxes in 1952 was 22.1%, while the average ratio for the 49 other leading industrial concerns was 26.9% (Pet. App. 43, 58). Indeed, no

[1] References preceded by "Pet. App." are to the Appendix to the petition. References to the record as reproduced in the court of appeals and forwarded to this Court will be preceded by "R.", except for references to stipulations and exhibits.

other industrial concern of comparable size earned a return even approaching that of petitioner, the second highest return on long-term capital being 63½% (compared to petitioner's 98%) (Exs. CA, CE; Stip. 9 ¶ 2).

2. *Tax Court proceedings.* After proceedings before the Renegotiation Board failed to produce agreement as to the amount, if any, of excessive profits realized by petitioner on its 1952 renegotiable business, the Board (pursuant to § 105 of the Renegotiation Act of 1951, 50 U.S.C. App. 1215), issued an order fixing the amount of excessive profits at $10 million (Pet. 2–3). Petitioner filed a timely petition in the Tax Court (pursuant to § 108 of the Act, 50 U.S.C. App. 1218), seeking a final determination, in a *de novo* proceeding, of the amount of excessive profits.

In a lengthy trial before a single-judge division of the Tax Court, the facts were fully developed by stipulations, by testimony filling 3,237 pages of transcript and by some 200 exhibits.[2] The case was extensively briefed by the parties, and by *amici curiae* supporting petitioner's position, and two full days were devoted to oral argument (R. Vol. I, 6–7; Vol. X, 3–326).

The only issues presented to the Tax Court were (1) the amount of petitioner's renegotiable profits,

[2] The record was kept open for two years while petitioner sought to enforce a subpoena of respondent's file of administrative proceedings. Petitioner prevailed in large part, *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654 (C.A. D.C.) and received most of the documents which it sought, but found nothing pertinent which it wished to introduce (R. Vol. I, 3–6, 122–123, 134).

and (2) the amount, if any, in which those profits were excessive. On the first question, the taxpayer contended, and the government denied, that the relatively small outlays for the design and construction of the prototype for the 707 commercial passenger airplane and the KC–135 military tanker were (i) current expenses (rather than capital expenditures), and (ii) were allocable to petitioner's renegotiable business. The court found that the prototype plane was a flying laboratory with a useful life of more than 25 years, that there was a reasonable certainty that it would produce income in future years, and hence that the prototype was a capital asset (Pet. App. 15–16, 20–21). Accordingly, it refused to follow an Internal Revenue ruling, based upon a contrary representation, which had granted petitioner permission to treat the prototype expenditures as current expenses for tax purposes (Pet. App. 16); instead, it held them to be capital expenditures not properly allocable to renegotiable business for the year 1952 (Pet. App. 17–21).

On the principal issue—the amount of excessive profits—the court, applying each of the factors which the statute makes relevant (§ 103(e), 50 U.S.C. App. 1213(e)), resolved much of the disputed testimony and many of the controverted subsidiary issues in petitioner's favor (e.g. Pet. App. 22–23, 44, 46–56, 57, 59–61). It held, however, that petitioner's extraordinarily high rate of return on invested capital indicated substantial excessive profits; that because of the high proportion of government-furnished facilities and working capital, petitioner's function was largely that of a manager, rather than a manufacturer; and

therefore that the negotiated profit rates, which were fixed without regard to this important consideration, were excessive (Pet. App. 45, 57–59, 62–63). In addition, the Court found that the "incentive" contracts which accounted for 80% of petitioner's profits in 1952, operated much like the outlawed cost-plus-a-percentage-of-cost contracts, and that the profits received under them were excessive (Pet. App. 63–67). Accordingly, the Court found that petitioner had received excessive profits in the amount of $13 million in 1952 (Pet. App. 67), leaving petitioner with profits of $43.7 million, for a return of approximately 75% on its invested capital.

Petitioner's motion for review by the entire Tax Court was denied, but was referred back to the single judge as a motion for reconsideration (R. Vol. II, 259). After extensive additional briefing by the parties[3] and the amici curiae, the court entered an order correcting an error in its opinion, but otherwise adhered to its decision (R. Vol. I, 260).

3. *Proceedings in the Court of Appeals.* Petitioner filed a petition for review in the Court of Appeals for the Ninth Circuit, asserting jurisdiction

[3] In asserting that the Tax Court's treatment of incentive contracts will impair the national security, the petitioner relied upon an excerpt from testimony given before a Congressional subcommittee by the Secretary of Defense, a few days after the decision. After a full analysis of the opinion, however, a duly authorized Assistant Secretary of Defense executed an affidavit, which respondent filed with the court, in which he enumerated the many changes which had been made in the terms of inventive contracts since 1952. In light of those many changes, petitioner's present reliance upon the earlier quotation (Pet. 7) is misplaced.

under 26 U.S.C. 7482. It contended that the Tax Court (1) erred in ruling that the prototype expenditures were not allowable as renegotiable costs for 1952; (2) misapplied certain of the statutory factors to be considered in determining excessive profits; (3) improperly considered the impact of incentive contracts on its profits, and incorrectly analyzed them; and (4) erroneously placed the burden of proof upon petitioner. It further maintained that these errors, taken together, deprived it of due process (Pet. App. 70–71).

The court of appeals ruled that petitioner had presented no constitutional issues, and that all of the issues on which it sought review were "questions of law and fact entering into the determination of the amount of its excessive profits" (Pet. App. 70–71). In accordance with the decisions of three other circuits, the court of appeals held that § 108 of the Renegotiation Act (50 U.S.C. App. 1218, *supra*, p. 2) precluded review of such questions, and dismissed the proceeding for lack of jurisdiction (Pet. App. 70–71).

ARGUMENT

The petition presents a single issue: whether the courts of appeals have jurisdiction to review Tax Court determinations under the Renegotiation Act of 1951 which do not involve constitutional and jurisdictional questions. The decision of the court below is in accord with the decisions of the three other circuits which have passed on it, and is clearly correct. Moreover, because Congress amended the Renegotiation Act to broaden appellate review in cases

filed in the Tax Court after July 3, 1962, the issue has no prospective importance. Accordingly, there is no occasion for review by this Court.

1. The Renegotiation Act of 1951, like its World War II counterpart, conferred upon the Tax Court "exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits received or accrued * * * and such determination shall not be reviewed or redetermined by any court or agency." [4] § 108, 50 U.S.C. App. 1218, *supra*, p. 2. The Internal Revenue Code, however, vests the courts of appeals with exclusive jurisdiction to review Tax Court decisions.[5] Soon after the passage of World War II renegotiation statutes, the Court of Appeals for the District of Columbia Circuit held that in renegotiation cases the courts of appeals were empowered to review constitutional and jurisdictional issues,[6] but no

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[4] For cases filed in the Tax Court after July 3, 1962, the Renegotiation Act now provides a broader measure of appellate review. Pub. L. 87-520 (July 3, 1962, 76 Stat. 134), 50 U.S.C. App. (Supp. IV) 1218, 1218a. (See *infra*, pp. 11-12).

[5] Sec. 7482 of the Internal Revenue Act of 1954, 26 U.S.C. 7482. The predecessor to this provision was Sec. 1141 of the Internal Revenue Act of 1939, 26 U.S.C. (1952 ed.) 1141, while the predecessor to Sec. 108 of the Renegotiation Act of 1951 was found at 50 U.S.C. App. 1191.

[6] *U.S. Electrical Motors* v. *Jones*, 153 F. 2d 134, 136-137 (jurisdiction of the Tax Court); *Ring Construction Corp.* v. *Secretary of War*, 178 F. 2d 714, certiorari denied, 339 U.S. 943 (constitutionality of Act as implied retroactively); *Eastern Machinery Co.* v. *Under Secretary of War*, 182 F. 2d 99, 100-101 (constitutionality of Act, and taking of property under Fifth Amendment); *Lowell Wool By-Products Co.* v. *War Contracts Price Adjustment Board*, 192 F. 2d 405 (jurisdictional question of applicability of Act to contracts); *Armstrong* v. *War Contracts Price Adjustment Board*, 194 F. 2d

others.[7] The Ninth Circuit, on the other hand, held that the provisions of the Renegotiation Act deprived the courts of appeals of all jurisdiction in such cases.[8]

In *United States* v. *California Eastern Line*, 348 U.S. 351, 354, this Court resolved the conflict by approving the interpretation of the District of Columbia Circuit.[9] In holding that the courts of appeals had jurisdiction to review the issue of whether contracts were subject to renegotiation, the Court endorsed the distinction between that jurisdictional[10] question and questions going to the amount of excessive profits, as to which the determinations of the

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875, certiorari denied, 343 U.S. 967 (same question); *Knu-Vise* v. *War Contracts Price Adjustment Board*, 195 F. 2d 198, 199 (procedural due process). Accord: *Marie and Alex Manoogian Fund* v. *United States*, 212 F. 2d 369, 370 (C.A. 6).

[7] *Ring Construction Corp.* v. *Secretary of War*, *supra*, 178 F. 2d at 715; *Eastern Machinery Co.* v. *Under Secretary of War*, *supra*, 182 F. 2d at 101; *Psaty & Fuhrman* v. *Stimson*, 182 F. 2d 985; *Knu-Vise* v. *War Contracts Price Adjustment Board*, *supra*, 195 F. 2d at 199, 200.

[8] *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560 (C.A. 9); see also, *Warner* v. *War Contracts Price Adjustment Board*, 188 F. 2d 363 (C.A. 9).

[9] Petitioner's contention that this Court "rejected the Circuit Court's limitation of review to constitutional and jurisdictional issues" (Pet. 4) is unfounded.

[10] The question of whether the contracts were subject to the Renegotiation Act was jurisdictional, because if the contracts were not subject to renegotiation, the renegotiators and the Tax Court would have been without jurisdiction. The District of Columbia Circuit had previously considered the issue jurisdictional, and subject to review. See fn. 6, *supra*. In *Golbert* v. *Renegotiation Board*, 254 F. 2d 416 (C.A. 2), because the only issue before the Tax Court was whether or not petitioner was a contractor with contracts subject to renegotiation, the court of appeals concededly had jurisdiction to review all questions (including burden of proof) pertaining to that issue.

Tax Court were "final and nonreviewable." 348 U.S. at 354–355. In accordance with this Court's ruling, the courts of appeals have consistently and properly refused to review legal or factual issues pertaining to Tax Court determinations of the amount of excessive profits,[11] and have confined their review of renegotiation cases to constitutional and jurisdictional issues.[12]

The questions which petitioner raised in the court of appeals were concededly neither constitutional nor jurisdictional, but rather, as that court noted, "questions of law and fact entering into the determination of the amount of its excessive profits" (Pet. App. 70). Under the express terms of § 108, and under the uniform decisions of the courts of appeals approved by this Court in *California Eastern Line*, such questions were not subject to review in the courts of appeals.[13]

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[11] *Ebco Manufacuring Co.* v. *Secretary of Commerce*, 221 F. 2d 902 (C.A. 6); *Vaughn Machinery Co.* v. *Renegotiation Board*, 273 F. 2d 235, 236 (C.A. 6); *Grannis & Sloan* v. *Renegotiation Board*, 285 F. 2d 908 (C.A. 4), certiorari denied, 368 U.S. 822. See *Litton Industries* v. *Renegotiation Board*, 298 F. 2d 156 (C.A. 4).

[12] *Vaughn Machinery Co.* v. *Renegotiation Board*, *supra*, 273 F. 2d at 236 (whether contracts were subject to Act or within its exemption); *Golbert* v. *Renegotiation Board*, 254 F. 2d 416 (C.A. 2) (whether petitioner was a contractor to whom Act was applicable, or an employee; and the burden of proof on that issue).

[13] Petitioner suggests that there would be substantial doubts as to the constitutionality of the Act if read to preclude judicial review of the questions it presented to the courts of appeals (Pet. 8–9). This suggestion is insubstantial. *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 427 (C.A. 9). See, *Lichter* v. *United States*, 334 U.S. 742, 787–788. The concurring opinion of Mr. Justice Brandeis, in *St. Joseph Stock*

2. Because Pub. L. 87–520 broadened the jurisdiction of the courts of appeals for cases filed in the Tax Court after July 3, 1962,[14] the issue raised by the petition is of limited application and no prospective importance. It could arise only in cases which were filed in the Tax Court on or before July 3, 1962. There are 45 such cases pending in the Tax Court, involving approximately 28 companies other than petitioner. Experience indicates that many of these cases will be disposed of without trial.

To be sure, the case at bar was the first to be tried of the 17 pending cases brought by petitioner and five other members of the airframe industry which involve determinations of excessive profits of almost $100 million[15] (Pet. 6; Pet. App. 77), and the determination of excessive profits in this case provides guidance for similar determinations (by trial or agreement) in the remaining cases. However, the actual determination of excessive profits for each contractor depends ultimately upon a painstaking analysis of the

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Yards Co. v. *United States*, 298 U.S. 38, 73–93, upon which petitioner relies, would only require "the independent judgment of a court on the ultimate question of constitutionality," not on every issue of law. 298 U.S. at 84.

[14] Public Law 87–520 specifically made the new review provisions inapplicable to cases filed in the Tax Court prior to its effective date, § 2(d), 76 Stat. 134. This decision was, of course, deliberate. S. Rep. 1669, 87th Cong., 2d Sess., p. 6.

[15] Originally, eight members of the aircraft industry, including petitioner, brought a total of 24 cases, involving determinations of $139.4 million. Six of those cases, involving two companies and determinations of approximately $41 million, have already been disposed of by trial, voluntary dismissal, and by agreement without any appeals.

particular facts in each case.[16] Petitioner concededly cannot obtain appellate review of that determination; and the issues on which it does seek review (Pet. 8–9) are either wholly absent from or without importance to the cases of the five other companies.[17] The resolution of the issue presented by this petition, therefore, could have little if any effect on the remaining cases. The mere fact that large sums of money are involved in litigation between the government and six members of an industry does not, therefore, warrant review by this Court of an issue that has long been settled and has no prospective importance.

3. Petitioner's contention that it suffered "grave injustice" because the Ninth Circuit refused to reach the merits (Pet. 8–9) is wholly unwarranted. The Tax Court's determination of excessive profits left

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[16] In the second of the group of cases to go to trial, *North American Aviation, Inc.* v. *Renegotiation Board*, 39 T.C. 207, for example, the Tax Court reduced the amount of excessive profits by $3.5 million (or 17½%) from the respondent's original determinations, rather than increasing the amount by 30%, as it did in this case. Yet, far from disavowing the basis for decision in this case, as petitioner suggests (Pet. 7–8), the Tax Court ruled that the primary consideration establishing excessive profits in both cases was the high return on net worth, in contracts which entailed no risk of loss. 39 T.C. at 228–229.

[17] Of the three issues which petitioner mentions in its petition (Pet. 8–9), the first issue (prototype) is unique to petitioner. As to the second issue, burden of proof, the correct rule was never in dispute in the Tax Court between the parties in this case and is not, to the best of our knowledge, a matter of controversy between the respondent and the five other companies. On the third issue, regardless of whether the terms of incentive contracts should be considered under Sec. 103(e)(6), everyone agrees that they are relevant under the other statutory factors. See fn. 19, *infra*.

petitioner with profits of $43.7 millions on its 1952 renegotiable business, for a rate of return of 75% on its total capital invested, on contracts which entailed absolutely no risk of loss.[18] Indeed even after renegotiation, petitioner's rate of return on its net worth in 1952 was more than three times as high as the average for American industry, and its rate of return on total invested capital was the highest in the nation for firms of its size (*supra*, pp. 3–4). The Tax Court's decision was eminently fair, indeed generous, and would not have been disturbed even had an appeal been available.[19]

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[18] A fair and reasonable profit is, of course, a "return to the equity owner * * * commensurate with returns on investments in other enterprises having corresponding risks." *Federal Power Commission* v. *Hope Natural Gas. Co.*, 320 U.S. 591, 603.

[19] Even under the broadest standards of appellate review, petitioner could not sustain its contention (Pet. 8–9) that the Tax Court committed three reversible errors: (1) Having found that there was a reasonable business certainty in 1952 that the prototype airplane would produce income in future years (see *supra*, p. 5), the Tax Court was certainly justified in ruling that the expenditures necessary to create it constituted a capital investment, and not costs of renegotiable business in 1952 (*Hart-Bartlett-Sturtevant Grain Co.* v. *Commissioner of Internal Revenue*, 182 F. 2d 153 (C.A. 8)); (2) Contrary to petitioner's assertion, the Tax Court did not depart from its established practice of imposing the burden of proof upon petitioner to show that its excessive profits were less than those determined initially by respondent, while imposing upon respondent the burden of showing that they were greater. That practice was accepted by both parties in the Tax Court, and the court's only reference to the question (Pet. App. 44) is consistent with that practice; (3) Petitioner is hardly in a position to complain that the Tax Court considered the impact of incentive contracts in terms of "the public interest and fair and equitable dealing," Sec. 103(e)(6), 50 U.S.C. App. 1213(e)(6), because it had asked for favorable consideration of such contracts under that

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL, 1964.

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factor (R., Vol. I, pp. 13, 39–40; see, 35–40). At any rate, both sides introduced evidence on that subject, and agreed that it was relevant under other statutory factors, so that petitioner's complaint is academic.